No. 94-1305

FILED
APR 19 1995
OFFICE OF THE CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1994

VOLKSWAGEN OF AMERICA, INC. AND
VOLKSWAGENWERK AKTIENGESELLSCHAFT,
PETITIONERS,

v.

AMPARO HERNANDEZ-GOMEZ,
RESPONDENT.

On Petition for a Writ of Certiorari to the Supreme Court of Arizona

SUPPLEMENTAL BRIEF FOR THE PETITIONERS

MICHAEL HOENIG
IAN CERESNEY
Herzfeld & Rubin, P.C.
40 Wall Street
New York, NY 10005
(212) 344-5500

KENNETH S. GELLER*
ERIKA Z. JONES
JOHN J. SULLIVAN
Mayer, Brown & Platt
2000 Pennsylvania Ave., N.W.
Washington, DC 20006
(202) 778-0613

CRAIG L. WINTERMAN
Herzfeld & Rubin
1925 Century Park East
Suite 600
Los Angeles, CA 90067
(310) 553-0451

WILLIAM T. BURGHART
Fennemore Craig
Two North Central Avenue
Suite 2200
Phoenix, AZ 85004
(602) 257-8700

**Counsel of Record*

BEST AVAILABLE COPY

TABLE OF AUTHORITIES

Cases: **Page(s)**

Cipollone v. *Liggett Group, Inc.*
112 S. Ct. 2608 (1992) 2, 3

Freightliner Corp. v. *Myrick*, No. 94-286
(Apr. 18, 1995) 1, 2, 3

In the Supreme Court of the United States

OCTOBER TERM, 1994

No. 94-1305

VOLKSWAGEN OF AMERICA, INC. AND
VOLKSWAGENWERK AKTIENGESELLSCHAFT,
PETITIONERS,

v.

AMPARO HERNANDEZ-GOMEZ,
RESPONDENT.

On Petition for a Writ of Certiorari to the Supreme Court of Arizona

---

SUPPLEMENTAL BRIEF FOR THE PETITIONERS

The petition in this case challenges a decision of the Supreme Court of Arizona holding that respondent's common law tort claim is not preempted by federal law. Specifically, the petition explains that respondent's contention that her automobile was defective under state law because it was not equipped with a manually activated lap belt is preempted by Federal Motor Vehicle Safety Standard 208, which gave petitioners an option, for safety reasons, *not* to install manual seat belts in the car. Because of the similarity between this issue and the questions presented in *Freightliner Corp.* v. *Myrick*, No. 94-286, we suggested that the Court hold this petition and dispose of it as appropriate in light of the decision in *Myrick*.

The Court has now decided *Myrick*, and that decision confirms that the petition in this case should be granted.

1. The Court granted certiorari in *Myrick* to review the Eleventh Circuit's decision that implied preemption is no longer available under the Safety Act because the Act contains an express preemption provision. In the Eleventh Circuit's view, this Court held in *Cipollone* that the implied preemption doctrine does not apply in cases involving federal statutes that have express preemption clauses. 13 F.3d at 1522. In this case, the Arizona Supreme Court declined to reach petitioners' implied preemption claim for precisely the same reason. Relying on the Eleventh Circuit's decision in *Myrick*, the court below held that "when the statute addresses preemption, its text defines preemptive reach and 'implies that matters beyond that reach are not preempted.'" Pet. App. 15a, quoting *Cipollone*, 112 S. Ct. at 2618.

This Court's decision in *Myrick* thoroughly repudiated the Eleventh Circuit's (and the Arizona Supreme Court's) strained reading of *Cipollone*. The Court held — unequivocally and without dissent — that the mere presence of an express preemption clause does *not* "obviate the need for analysis of an individual statute's [implied] pre-emptive effects." Slip op. 8. As the Court stated, "that Congress did not intend to pre-empt other matters does not mean that the express clause entirely forecloses any possibility of implied preemption." *Ibid.*

Accordingly, the Arizona Supreme Court was plainly wrong in reversing the decision of the Arizona Superior Court, which found respondent's claims to be impliedly preempted (Pet. App. 21a), on the ground that, in light of "'*Cipollone*'s clear instruction,'" it could not even "'consider implied preemption.'" *Id.* at 15a, quoting *Myrick*, 13 F.3d at 1522. Therefore, petitioners are entitled to have the judgment of the Arizona Supreme Court vacated and the case remanded for reconsideration of the preemption issue in view

of this Court's contrary decision in *Myrick*. Indeed, the Arizona Supreme Court itself stated that, had it not been for *Cipollone*, it "might have been constrained to adopt the view of the federal courts and find implied preemption" here. Pet. App. 11a. Now that this Court has firmly rejected the reading of *Cipollone* adopted by the court below, a remand is plainly in order.

2. The disposition we urge is fully in accord with the view of NHTSA, the expert federal agency concerned with motor vehicle safety. The Solicitor General argued that the preemption claims in *Myrick* should be rejected because, as the Court ultimately held, "there [is] no federal safety standard established under the Safety Act 'in effect' with regard to [ABS devices] (the relevant 'item of equipment') in trucks and trailers." *Myrick* U.S. Br. 11. By contrast, the Solicitor General distinguished cases, such as this one, arising under FMVSS 208, on the ground that state-mandated restraint devices "would have frustrated the Secretary's policy judgment [under FMVSS 208] and would have had an adverse effect on safety" (*Myrick* U.S. Br. 28). Thus, it is essential that the Court not allow the Arizona Supreme Court's preemption ruling, based on a rationale that is "without merit" (*Myrick*, slip op. 7), to remain standing.

In sum, this Court should grant certiorari, vacate the judgment below and remand for reconsideration of petitioners' preemption claim in light of the decision in *Myrick*.

Respectfully submitted.

MICHAEL HOENIG
IAN CERESNEY
Herzfeld & Rubin, P.C.
40 Wall Street
New York, NY 10005
(212) 344-5500

KENNETH S. GELLER*
ERIKA Z. JONES
JOHN J. SULLIVAN
Mayer, Brown & Platt
2000 Pennsylvania Ave., N.W.
Washington, DC 20006
(202) 778-0613

CRAIG L. WINTERMAN
Herzfeld & Rubin
1925 Century Park East
Suite 600
Los Angeles, CA 90067
(310) 553-0451

WILLIAM T. BURGHART
Fennemore Craig
Two North Central Avenue
Suite 2200
Phoenix, AZ 85004
(602) 257-8700

**Counsel of Record*

APRIL 1995